IN THE COUNTY COURT OF VICTORIA
AT BALLARAT
CRIMINAL JURISDICTION

Revised
Not Restricted
Suitable for Publication

Indictment No. C1917393.3
CR-20-00188
CR-20-00760

THE QUEEN

v

PAUL BAKER

and

NATHAN JOSEPH

JUDGE:	HIS HONOUR JUDGE MURPHY
WHERE HELD:	Melbourne
DATE OF HEARING:	25 August 2020 and 24 September 2020
DATE OF SENTENCE:	6 October 2020
CASE MAY BE CITED AS:	R v Baker & Anor
MEDIUM NEUTRAL CITATION:	[2020] VCC 1618

REASONS FOR SENTENCE

CRIMINAL LAW – Plea – Co-accused – Dishonesty offences – Obtain financial advantage by deception – Attempt to obtain financial advantage by deception – Possess identification information – Deal with property suspected to be the proceeds of crime – Significant offending – Primary victims were financial institutions – Offending facilitated by identities purchased on the dark web – Persistent offending – Protracted and sophisticated fraud – Fraudulent use of individual accounts against financial institutions – *Crimes Act 1958*.

CRIMINAL LAW – Sentence – Offender Baker – Additional charge of blackmail – Commit indictable offence whilst on bail– Blackmail being an inherently serious offence – Personal threats – Nasty Offence – Personal threat– Relevant criminal history – Instigator of the offending – Shared execution – Drug addiction – Gambling addiction – Good functioning level of intelligence – Specific deterrence especially salient – Totality – Parsimony– Leniency based on the diagnosis of an anxiety condition – *DPP v Oksuz* [2015] VSCA 316, considered – Effect of the COVID-19 Pandemic considered – *R v Verdins* (2007) 16 VR 269 – *Brown v The Queen* [2020] VSCA 212 , distinguished – Total Effective Sentence 28 months imprisonment – 15 month Non-Parole Period.

CRIMINAL LAW – Sentence – Offender Joseph – Few relevant prior convictions – Shared execution of the offence – Offender of below average intelligence – No diagnosis of a mental disorder – Dependent personality – Totality – Parsimony – *Sentencing Act 1991* – *Boulton v The Queen* (2014) 46 VR 308 – Total Effective Sentence – 10 months imprisonment – 16 month Community Corrections Order.

APPEARANCES:	Counsel	Solicitors
For the Crown	Mr P. Pickering	Ms A Hogan, Solicitor for Public Prosecutions
For Accused BAKER	Mr A. Madden	Buscombe & Madden
For Accused JOSEPH	Mr Z. Petric	Adrian Paull Criminal Lawyers

To ensure there is no possibility of identification, this sentence has been anonymised by the adoption of pseudonyms in place of names of the victims and family or witnesses.

HIS HONOUR:

1 Paul Baker and Nathan Joseph, you have each pleaded guilty to 15 charges of obtaining a financial advantage by deception[1], one charge of attempting to obtain a financial advantage by deception[2], one charge possessing identification information[3], and one uplifted charge of dealing with property suspected of being the proceeds of crime.[4]

2 In addition, Paul Baker, you have pleaded guilty to one charge of blackmail[5], and one further charge of dealing with property suspected of being the proceeds of crime, and a charge of committing an indictable offence whilst on bail.[6]

3 The maximum penalties for the offences are set out in the prosecution opening[7] with blackmail carrying 15 years' imprisonment, obtaining a financial advantage 10 years, attempt to obtain financial advantage 5 years, possessing identification information 3 years, and dealing with property suspected of proceeds of crime 2 years. For the offence of committing an indictable offence on bail the maximum penalty is 3 months imprisonment or 30 penalty units.

The circumstances of the offences.

4 Before digesting the circumstances of the offences, I note the following; the main dishonesty offending here is alleged to have occurred over the period 3 October 2018 until 8 June 2019. The offence of possession of identification information is alleged to have occurred over the period 1 January 2018 until

1 Contrary to s82(1) of the *Crimes Act 1958*
2 Contrary to s82(1) and 321M of the *Crimes Act 1958*
3 Contrary to s192C (1) of the *Crimes Act 1958.*
4 Contrary to s195 of the *Crimes Act 1958.*
5 Contrary to s87(1) of the *Crimes Act 1958.*
6 Contrary to s30B of the *Bail Act 1977.*
7 Exhibit A on the plea.

31 July 2019, which was the date police raided your property, which is also the date for the uplifted summary charge of dealing with property suspected of being proceeds of crime.

5 In February 2018, the two of you met and formed a relationship and subsequently, were living in a domestic relationship and occupying a bedroom in Unit 8/304 Richard Street, Ballarat. This was a block of housing commission units. Mr Baker, your mother, Wendy Baker was the tenant. She also lived in the property and was not involved in your criminality. Before you moved into the Richard Street address, Mr Joseph, you had previously resided at another address in Ballarat.

6 You are to be sentenced on the basis of the prosecution opening, which was read in open court on the plea, and which was not disputed by either of you. Before turning to the individual charges, it is necessary to provide an overview of how the offending was carried out.

7 In essence, the charges involve a protracted and sophisticated fraud against a number of financial institutions by the fraudulent use of accounts held by individuals with those institutions. It was perpetrated by the two of you using identity documents obtained from that part of the internet known commonly as the 'Dark Web'. On the Dark Web, there are online cybercriminal invitation-based sites such as '*genesis.market*', that provide a market for stolen digital fingerprints.

8 Criminals can purchase profiles of members of the public which can include browser fingerprints, website user log-ins, and passwords, phone numbers, cookies, and credit card information. Such data and profiles are referred to as, 'Bot profiles'. These bots can be purchased from anywhere from US $1 to $50-60. The site trades in Bitcoin.

9 In the record of interview, you Mr Baker stated that you may have purchased

up to 400 of these bots over the period.

10 Once you had obtained the bots, you then sought the use of identifying information, including email addresses to search for personal documents such as bank accounts and phone numbers, passports, and licenses, and email accounts. You used this information to exploit weaknesses in control systems of financial institutions to transfer or port phone numbers to other accounts, to have new phone numbers linked to old and newly established accounts, to establish credit cards and accounts in false names, to transfer funds to accounts that were now controlled by you and ultimately, to use access to the funds for cash withdrawals, gift cards, the purchase of consumer durables, particularly Apple devices, on credit cards, and also to pay bills.

11 Goods that were obtained were then sold on internet sites or exchanged for cash which was then used for the purchase of drugs and on living expenses. In this way, the goods that were found in your possession when the police executed the warrant, and that were the subject of the uplifted summary charge of dealing with property suspected of being proceeds of crimes were the goods found.

12 To perpetuate your activities, you used both the address at which you were both living, other units in the complex, the previous address of you, Mr Joseph, and at times, phone numbers registered in the name of your mother, Mr Baker. You, Mr Joseph, had a form of photographic ID which you were able to use to collect purchased goods from retailers. That included travelling to Maribyrnong from Ballarat, to collect items from Harvey Norman.

13 The victims in this matter include both individuals and financial institutions who were the subject of deceptions. But the burden of the financial fraud was borne by the financial institutions rather than the individual customs. It was part of your rationale for the offending, that you calculated that the losses

would fall on the financial institutions, rather than the holder of the individual accounts.

14 The charges include a number of individual charges as well as rolled-up charges. With that overview of the modus operandi, I turn to summarise the individual charges of obtaining a financial advantage by deception that you have pleaded guilty to.

Summary of the Obtain Financial Advantage by Deception Offences

15 Charge 1 is a rolled-up charge with a total amount of $2973 and the offending occurred on 3 October 2018. The victim's husband lost his driver's license and a credit card in the name of his wife. It was used by the two of you to withdraw $1000 cash from an ATM machine in Ballarat. Another cash advance was withdrawn from Western Union and collected from a post office in Ballarat. The card was then used to purchase a PlayStation worth $439 at JB HiFi and a Nokia smartphone on eBay. The phone was delivered and signed for P. Baker and the phone was located when the search warrant was executed.

16 Charge 2 to 4, the victims were Robert and Michelle Bowers. Around mid-October 2018, you purchased the personal details of Robert and Michelle Bowers. You used the information to then apply for and open a total of seven bank accounts in their names with the ING Bank and one with Suncorp Bank. Only one of the accounts had any transactions. The relevant cards for the accounts were sent to the address that you were living at. Michelle Bowers subsequently received advice from ING that she was collecting mail from your address, yet she had never opened the relevant account. The advantage alleged, is the opening of the accounts, as in this case no financial amounts were obtained.

17 Regarding charges 5 to 9 the victim was Ronald Edwards.[8] The victim's identifying details were obtained from a website known as sandwells. Charge 5 is a rolled-up charge wherein you used the material to access email accounts and information. You then fraudulently used the ANZ credit card for a total of 11 transactions for liquor and one taxi charge. You used a false name for one of the shipments from Dan Murphy's and used a phone number registered to Wendy Baker. The total deception involving the card in the name of Mr Heart over the period 14-15 January was $620.36.

18 Charge 6 is a further rolled-up charge involving the financial institutions Westpac, Commonwealth Bank, and American Express credit cards. You opened credit cards in Mr Edwards' name using those details you had obtained. Four cards were issued by Westpac and one by the CBA and were forwarded to the victim's address in Richmond. Both the Westpac and CBA cards gave the address as Unit 4/304 Richard Street, while the former used your phone number, Mr Baker, while the credit card, the CBA card used to the phone number registered to Wendy Baker. No money was obtained, as the victim closed the accounts before any transactions occurred.

19 On 25 January, Mr Edwards received two AMEX cards in the mail of his Richmond address. One was in his name, and the other was in the name of a Bill Mikhail. They were obtained using his online banking profile. No false application was required, and he did not request the additional cards.

20 Charge 7 is a charge attempting to obtain financial advantage by deception involving Mr Edwards. The two of you applied for a credit card with Latitude Finance for $7000 in his name. It was declined; thus this offending constitutes an attempt to obtain financial advantage. Mr Edwards performed a credit check, which revealed the attempt to open the account. Latitude Finance

[8] A pseudonym

noted that the application in the address was 'Blank 304 Richard Street Ballarat' and a phone number was given registered to your mother, Mr Baker.

21 Charge 8 involves the two of you setting up a Bendigo Bank account in Mr Edwards' name and moving $12,000 over four transactions to it, from his ANZ bank account. He discovered the transactions, attended Bendigo Bank, and closed the account, with the money being stopped before it was credited to the Bendigo Bank account.

22 Charge 9 is a charge of blackmail, which relates only to you, Mr Baker. On 25 January 2019, you ported Mr Edwards phone number from Telstra to Optus, and during that time his email account. The email address contained photos of his Medicare card, driver's license, passport, as well as tax returns, tax file numbers, and superannuation and income protection information. On 25 January, you Mr Baker, sent him a threatening email from Mr Edwards recovery email address. The email was headed, 'Seriously take note' and read as follows,

> '*Ronald*[9], gonna give you some advice, okay? Let it go for a couple of days, you know you'll get everything back. You should not have fucked with Westpac Bank and that $14,500 credit card that I got approved in your name because you were fucking stupid enough to leave it, nearly every single important document like driver's license, photos, passports scan, birth certificate, wedding license, the last four years of your tax return, PAYG summaries et cetera et cetera et cetera. Fucking, et cetera. I hope I have your complete attention. If you do not stop trying to recover your logs, we will upgrade this nightmare for you to unimaginable levels, like your fucking career may be in jeopardy!! Banks, credit card companies, finance companies will refund your memory and you will not be liable. You're a fucking DR (meaning doctor) for Christ's sake. You'll be right. Just let it take its course, give us two days. Because remember, we have all your information and know lots of your information and know lots of your secrets that you probably don't want *Cara*[10] to find out about. Okay. Thanking you, signed anonymous'.[11]

23 And there was an image of the 'Guy Fawkes Anonymous' cartoon character, with the email signed *anonymous*. The email clearly references the Westpac

9 A pseudonym
10 A pseudonym
11 Exhibit B on the plea (page 128 of the Depositions).

credit card, the subject of Charge 6 and the reference to Cara[12] is a reference to Mr Edwards spouse. No further action was taken by you after sending that email.

24 Charges 10 to 12 involve the victim, Mr Fisher. Around 7 February 2019, you had obtained the personal details of Mr Steven Fisher and used them to access his personal mobile phone number. You then ported the number to Optus and accessed his Google email account. You then made three new payment platform transfers from one of his accounts totalling $1974, and a another $400 from his Bank First accounts. So, Charge 19 involves a sum of $2374.

25 Charge 11 is a rolled-up charge involving a total dishonesty of $38,500 from his member's equity account. On 7 January, the two of you conducted five bank transfers for a total value of $14200 from his Member's Equity ('ME') account to an account in the same institution in your name, Mr Baker. On the same day, the two of you made five further transfers totalling $7300 from his ME account to an ING account, that had been sent up by you, Mr Baker in Ronald Edwards name, the earlier victim. On the same day, the two of you made four further transfers from the same ME account of Mr Fisher, totalling $11,000 to two Westpac accounts that you, Mr Baker, had established in the false names of Wisher Help and Fregal. The two of you also transferred $6000 into a Bank First account in separate transactions. That is Charge 11.

26 Charge 12 is another rolled-up charge involving a total of $14876 being the total of six different BPAY payments made from Mr Fisher's ME account to three other institutions including Telstra. There were two other uncharged acts here alleged against you, being attempted new payment platform transfers but they were declined. The money from the actual transfers was remitted to a Westpac Bank account, in the name of Fregal that you, Mr Baker, had

[12] A pseudonym

established in her name. The quantum of the deception involving Mr Fisher was $55,750. The funds were all recovered by his bank, ME.

27 Charges 13 to 15 involve a victim, Mr Habib. Both of you obtained his personal details from the *genesis.market.* On 10 March, the two of you used his eBay account to purchase on Click N Collect five separate items from Big W in Ballarat for a total sum of $537.85.

28 Charge 14 occurred on 13 March when you transferred $100 from his account to a bank account in your name, Mr Joseph.

29 Charge 15 is a rolled-up charge for offending over the period 12 to 25 March, involving six separate transactions totalling $15,836.79 where you falsely represented that you were the authorised user of a Gem Visa online account in the name of Mr Habib. This involved electrical goods from Harvey Norman, Kogan, and the Good Guys.

30 Charge 16 involves you obtaining $930 from the CBA by falsely representing that you were the authorised user of an Afterpay account in the name of Alexander Woodworth. The bank suffered the losses, the customer's account was reimbursed.

31 Charge 17 is a rolled-up charge where over the period 20 March to 8 June, you purchased online personal details of 10 individuals and used their Gem Visa online accounts issued by Latitude Finance to purchase various electrical and household goods from the Good Guys and Harvey Norman. The total quantum of deception involving these 10 individuals was $76,816.45.

32 The final indictable offence was possession of identification information not related to you. This offence alleged to have been committed over the period 1 January 2018 to 31 July 2019, relates to the identification information of the victims, the subject of all the earlier charges, that you had purchased over the

internet to commit the earlier offences.

33 Police also identified a number of other interstate victims, being clients of Latitude Finance whose identities had been used to obtain property by deception, with the last two of you being identified the perpetrators. They have been unable to contact the victims. Latitude Finance also discovered 20 fraudulent applications for credit cards which it declined, but which had a similar modus operandi linking the two of you to the applications including the use of addresses at Units 4, 5, 8, 9, and 10 of 304 Richards Street, Ballarat East. These are all uncharged acts.

34 The uplifted summary charge of dealing with property suspected of being the proceeds of crime, relates to at least 27 items including electronic devices, including PlayStations, mobile phones, security cameras, a television, a headset, a ceiling fan, a smartcard reader, a card scanner, and cards from CBA, ING, and Bendigo Bank, and other identifying information. All these items were found at your property when the police executed the search warrant on 31 July. The police had commenced a major investigation into various deceptions in May after undertaking enquiries from Harvey Norman, Kogan, and the Good Guys.

[35] The other charge against you, Mr Baker, of dealing with property suspected of being proceeds of crime, arises out of your arrest on 24 January 2020 in Prahran, when you were found in possession of small quantity of methylamphetamine and a credit card in the name of a person or individual that was not your own. You were dealt with by the Magistrate for the possession of the methylamphetamine and the credit card relates to summary charge of dealing with property suspected of proceeds of crime. This offence gives ~~ruse~~ rise to the additional summary charge of committing an indictable offence whilst on bail because you were on bail for the original offending at the time that you were picked up for these offences.

Overall magnitude of the offending.

35[36] The offending encompassed in the various counts involves the compromising of 17 individual accounts with a number of financial institutions and the use of those accounts to purchase items online from white goods retailers. The total attempts to purchase goods were $98,100, of which $38,400 was recovered, and Latitude Finance suffered a loss of $59,700. The total amounts charged of the obtain financial advantage by deception is $153,564.48 and $7000 of attempted obtaining financial advantage by deception. Thus, taking into account the amounts recovered, the total amount that you derived benefit from by your conduct comes to $55,464 in monetary terms and goods.

Assessment of the seriousness.

36[37] Each of your counsel did not dispute the seriousness of the offending here. The main offending is over a period of eight months from October 2018 to May 2019. It involved the obtaining of online identities of 17 individuals and the manipulation of that material to obtain a financial advantage, or attempt to obtain a financial advantage, from a number of financial institutions including Coles Mastercard, ING Bank, Suncorp, ANZ, Westpac, CBA, Afterpay, American Express, Bendigo Bank, Latitude Finance, Bank First, Member's Equity, PayPal, and Gem Visa online.

37[38] The manipulation included porting of email accounts, moving funds from hacked accounts to your own accounts, or accounts that you had established, and applying for a number of credit cards in false names. Your conduct involved the use of phone numbers registered to Wendy Baker, there was also the use of phone and phone numbers that you had utilised in false names, and receipt of various items at addresses other than the address at which the two of you were residing.

38[39] There was persistency in your conduct in that the financial institutions and the

individual victims sought to block the transfers, yet you continued with other like fraudulent activity. You were able to exploit system weaknesses in financial institutions, in particular, the GO Mastercard issued by Harvey Norman and Latitude Finance.

39[40] While you were able access the individual personal information on the internet, once in possession of that material there were numerous individual acts within the charges, to make use of that information to establish other accounts, transfer funds to other accounts, ready to be exploited for transactions. There was the purchase of readily saleable goods online, particularly Apple devices, and then collecting the goods, including liquor, which according to your record of interview, all the goods or liquor were sold or exchanged for methylamphetamine or for drug debts.

40[41] As emphasised by the learned Crown Prosecutor, this was serious offending against a number of financial institutions. Insofar as it exploited personal data held by those institutions of individuals, for the purpose of extracting funds from the individuals, it undermines the confidence of members of the broader community in those financial institutions. It also involves the invasion of the digital privacy of the secondary victims, the individual account holders.

41[42] While the financial institutions bore the direct loss, and while there were no victim impact statements filed, it is reasonable to infer that the individual victims felt a sense of violation as they were not to know what other personal information you had obtained from them, nor the extent to which you might disseminate that material. In addition, there is all the inconvenience of having to cancel credit cards and re-establish bank accounts after your hacking of their individual accounts.

Blackmail Charge: Offender Baker

42[43] I turn to Charge 9, the blackmail charge against you, Mr Baker, alone. You

pleaded guilty to this charge. This is a serious offence, carrying a maximum penalty of 15 years imprisonment. It is often described by judges as a 'Nasty offence'.[13] You used the information obtained from hacking the account to send the email that I have referred to. In the record of interview, you said it was a, 'Template communication obtained from the internet'. After sending it, no further action was taken. You conceded in the record of interview that it would have been regarded seriously by the recipient.

43[44] I regard the conduct as serious; you obviously modified a template to make reference to the spouse of the victim and included the fact that he was a medical practitioner and thus was in a position where his reputation may have been damaged. It is a fair inference that he would have feared that this might occur. Further, the email itself evidenced your access to personal information that you had obtained by the original purchase of the information.

44[45] While nothing came of the email and you did not follow it up, and there were no threats accompanying the communication, you must bear a high degree of culpability for sending that communication. Your conduct in sending it is consistent with the persistence that each of you evidenced in the offending as each of you sought to exploit weaknesses in the security systems of major financial institutions.

Prior convictions.

Offender Baker

45[46] Before turning to assess your individual culpability for the offending, I note your prior convictions. You, Mr Baker, were born in August 1984. You thus had just turned 36. You were found guilty of four charges of shop-stealing in 2005 when you were aged 20. You were fined without conviction. On 27 October 2009, you received a without conviction disposition for unlawful

[13] See *DPP v Oksuz* [2015] VSCA 316 [226] (Croucher AJA)

assault. On 4 March 2010, you were dealt with for a number of driving offences being two charges of drive whilst disqualified, and two of exceeding PCA. You were sentenced to three months' imprisonment by way of an intensive Corrections order followed by 12 months Community Corrections order.

46[47] On 2 December 2010, you were found to have breached the ICO and it was confirmed. The community corrections order was found to have been breached and were sentencing to 87 days' imprisonment, suspended for a 12 month period. You were later found to have failed to comply with the ICO on 5 February 2013. On 16 February 2016, you were sentenced to an 18 months Community Corrections order for criminal damage. The order included assessment and treatment for drug and alcohol and mental health.

47[48] On 23 October 2017, on a charge of handle and receive and retain stolen goods, you were convicted and sentenced to another 12 months community corrections order, including 35 hours community work. That Community Corrections order expired on 22 October 2018. The offending encompassed in Charges 1 to 4 as well as Charge 18, thus overlaps the period of the Community Corrections order. The balance of the offending against you, Mr Baker, occurred after you had just concluded that sentencing disposition on 22 October 2018.

Offender Joseph

48[49] In relation to you, Mr Joseph, you were born in January 1989 and you are now 31. You have admitted minor traffic offences for which you were fined when you were aged 19 in Hobart and the use of a controlled plant or product in the Launceston Magistrates' Court where you were fined $150 on 20 August 2008. So, your prior offending has little relevance here.

Relative culpability for the offending.

[50] –As I have noted during the period of the offending, the two of you were in a domestic relationship. It is not surprising that neither of you sought to blame the other for the offending in the records of interview. I am satisfied, however, that you Mr Baker, bear greater culpability for the offending than Mr Joseph, for the following reasons.

49[51] First, you Mr Baker, are four and a half years older than Mr Joseph. Further, you have been before the courts on significantly more occasions than Mr Joseph. You have been sentenced to Community Corrections orders, Intensive Corrections orders, and a suspended sentence of imprisonment. Significantly, you have a prior conviction for a dishonesty offence, and as I have indicated for the part of the period of this offending, you were on a Community Corrections order which as I have noted ended on 22 October 2018. This is an aggravating consideration in your offending. So, your antecedents are such that you bear a higher degree of moral culpability for the offending.

50[52] In relation to the actual offending, you, Mr Baker, indicated that you were aware of the Dark Web and the ability to obtain the identities from that source, and this allowed the two of you to perpetrate the offending. You were thus the instigator of the offending. While according to the records of interview, both of you contributed to the offending by way of setting up the various accounts, and it was you, Mr Joseph who actually collected the goods on a number of occasions, because you were the one who had photograph I.D. Thus, effectively once the fraudulent modus operandi was established, which I am satisfied was your idea, Mr Baker, then the two of you shared the execution of it.

51[53] The explanation for the offending given by both of you in the records of interview was that you were both addicted to methylamphetamine, and used the goods obtained and the money for the purchase of the drug and to pay for

drug debts. This provides an explanation for the offending but no justification for it.

52[54] In your history to the forensic psychologist, Mr McKinnon, you Mr Baker also said you were addicted to pokies as an explanation for the offending, and you confirmed that in the CCO assessment. It is a matter of surprise that you did not give this explanation in the record of interview, where you were fully cooperative with the police. Having considered the matter, I am prepared to give you the benefit of the doubt on that matter, and I am satisfied that pokies addiction provides a partial explanation for your offending, Mr Baker. But for both of you, it is predominantly addiction to methylamphetamine.

The chronology of the proceeding.

53[55] The chronology of the proceeding followed in the arrest of each of you on 31 July 2019 as set out in the prosecution opening. As far as you were concerned, Mr Baker, you were bailed to appear on 5 August in the Ballarat Magistrates' Court, and failed to do so, and you faced the charge of failing to appear on bail. After a date mix-up on 21 August, the matter was listed for mention on 28 November when it was adjourned to allow you to obtain funding.

54[56] On 24 January 2020, you were arrested in Prahran and found to be in possession in a small quantity of methylamphetamine and the prescription drugs and the credit card which is the related summary charge. On 6 February, you indicated you intended to plead guilty and you were the subject of a hand-up brief and committed for plea in Ballarat on 10 March, but this date was vacated.

55[57] In relation to you, Mr Joseph, you were originally charged in the summary stream, and the matters were to be listed on 28 November 2019. However, the prosecution wished to have the matter dealt with in this Court, and it was

adjourned for a committal mention on 6 February 2020. There was a conflict in relation to your legal representation and this matter was listed on 20 February, but you were unwell, and it was adjourned to 5 March. You did not appear on that date; a warrant was executed on 18 March and you were bailed to 25 May when you did not appear, as you were self-isolating due to concerns about COVID-19. The matter was adjourned to 11 June 2020 and at that point you indicated you intended to plead guilty and you were committed for trial. You were dealt with for summary offences on that day and fined $600 without conviction, and for the fail to answer bail, you were fined $800 without conviction.

56[58] So, in relation to both of you, you pleaded guilty and in relation to both of you, it was an early plea. It has facilitated the course of justice and you are entitled to significant benefit for your plea of guilty. You have obviated the need for a committal and a trial, which in the COVID-19 environment, is a significant factor which I take into account in relation to both of you.

57[59] The plea of each of you is some evidence of remorse. In your case, Mr Baker, there is less evidence of remorse than that of Mr Joseph, as in the course of the record of interview, you sought to partially blame the individual account holders for failing to properly secure their digital information, and you expressed animus against one particular financial institution in the record of interview. But I do take into account in favour of both of you, that you gave full explanations to the police for your offending and thus, allowed the investigating officers to fully understand how you were engaging in the criminality and you received some benefit for that.

Personal circumstances.

58[60] The personal circumstances of each of you were outlined in the plea and are

included in the sentencing submissions which I exhibited[14], and in the history provided by each of you to the examining psychologist. I incorporate them by reference.[15]

Personal Circumstances: Baker

59[61] Mr Baker, you are now aged 36. You are the only child of a single mother and were brought up in the Ballarat area. You do not know your father and have never had a father figure in your life. You attended school in the Ballarat area until Year 10 and worked in a number of low-skill retail and food industry jobs. You also worked in the gaming industry, and had a license in that industry, and that led you to be introduced into gaming and being addicted to pokies.

60[62] You have been on a disability support pension for anxiety and panic attacks since 2009. You were seeing a psychiatrist up to 2017, but no report is available. You are not currently medicated for your condition and have learnt how to control it. You commenced seriously abusing alcohol when you were aged 18 but you ceased that for the last seven years. From your 20's, you commenced poly-substance abuse including high use of methylamphetamine and GBH during the period of the offending.

61[63] Since being charged, you have significantly reduced your drug use and since the lockdown, you are no longer using methylamphetamine and only use GBH a couple of times. As I have indicated, you were found in possession of methylamphetamine in January 2020, and you were dealt with for that in the Magistrates' Court, and placed on a good behaviour bond and required to be involved with the Salvation Army Positive Lifestyle program, and you did two sessions with that program until it was suspended due to the COVID-19 pandemic.

14 Exhibit C on the plea.
15 Exhibit 1 (Report of Mr McKinnon) and Exhibit 4 (Report of Mr Cummings).

Psychological reports.

62[64] Mr Baker, your counsel relied on the report from the forensic psychologist, Mr McKinnon.[16] He had examined you in a telephone consultation. He noted that you had never had any psychological treatment. He details your substance abuse and other addictive behaviour, and notes that in his view, you are suffering from conditions of generalised anxiety disorder, poly-substance abuse, poly-substance dependence disorder, and problem gambling disorder. His opinion is that while your past offending has occurred whilst under the influence of alcohol or illicit substance or to support gambling or substance abuse, should you overcome these difficulties, you are likely to lead a law-abiding lifestyle.

63[65] He is of the view that you possess good innate sense of functioning intelligence, and you have the capacity, with appropriate guidance to pursue tertiary education. He was of the opinion that the psychological deficits he identified made a significant contribution to your offending by affecting your ability to reason and make sound judgements, and eroded your sense of morality, and made you impulsive and prone to risk-taking and reckless behaviour. He is of the view that you require therapeutic intervention to address your problem gambling impulses and intermittent substance abuse.

Assessment.

64[66] Your counsel relied on the report of Mr McKinnon under the principles of *Verdins*[17] to reduce your moral culpability for the offending, and as to the type of sentence to be imposed. The report was subject of further submissions by both counsel following the recent decision in *Brown*.[18] The learned prosecutor in his submission was very critical of the report. He noted that the Court of

16 Exhibit 1 on the plea dated 4 July 2020.
17 *R v Verdins* (2007) 16 VR 269 ('Verdins')
18 *Brown v The Queen* [2020] VSCA 212 ('Brown')

Appeal in *Brown* opined that psychological reports need to be deeply scrutinized and that personality disorders of some severity would be required to engage *Verdins* considerations. I accept the prosecutor's submissions of the report and give it little weight in considering an appropriate sentence.

65[67] First, I give it little weight as the report was only prepared as a result of a single telephone consultation. Further, from the report, it appears that the examiner was not provided with the record of interview. In the record of interview, you made no reference to your gambling addiction, and the record of interview considers as a whole, which makes it a truthful account, and this makes the later explanation of gambling addiction as somewhat self-serving.

66[68] Further, the detailed explanation of your sustained determined offending in the record of interview makes it difficult to accept his opinion, that your judgment was affected by anything other than your addiction to drugs, which in any event, provides no basis to reduce your moral culpability.

Prospects of rehabilitation.

67[69] As this offending is the most serious offending for which you have been before courts, and on the report of Mr McKinnon your drug abuse has significantly diminished since your arrest, relying on the report, your counsel submitted that if your drug addiction and gambling impulses are addressed you are unlikely to re-offend. I am satisfied that if your drug addiction problems and insofar as you have an addiction to pokies are addressed, then your prospects for rehabilitation are reasonable.

68[70] Your counsel used the McKinnon report to make a submission that a CCO was the appropriate disposition. He submitted that all sentencing ends could be met via Community Corrections order. Insofar as you required drug treatment, then this could be best offered by a sentence to be served in the community, particularly in the current environment. He further submitted

consistent with the Court of Appeal decision in *Boulton*[19] that a CCO can be punitive and act as a deterrent. Your counsel accepted, however, that a custodial sentence was within range, but he submitted that if a Community Corrections order alone was inappropriate, then a combination sentence was an appropriate disposition. I had you assessed for a CCO and the report indicates that you are suitable. For reasons that I will explain in a moment, I have decided not to impose a CCO on you, Mr Baker.

Person Circumstances: Joseph

69[71] Turning to you, Mr Joseph, your circumstances are that you are an Aboriginal man from Tasmania and aged 31 and a half. Your father was murdered when you were aged nine and your mother suffered from mental illness and substance abuse. Your father left the marriage early in your life, and you were raised by your grandmother and an aunty. You completed half of Year 12 in Tasmania in 2008 and relocated to Adelaide and commenced using cannabis when you were aged 17. In Adelaide, you were introduced to recreational drugs and the party scene.

70[72] In 2010, you were introduced to methylamphetamine and have been dependent on the drug for the last 10 years. You were drug-free on two occasions but when your 17-year-old nephew died in 2017, you relapsed. You were involved in a same-sex relationship between 2010 and 2016; this commenced in Adelaide and you moved then to Ballarat and separated in 2016 and moved back to Tasmania after a period in Queensland. Then, you returned to Ballarat in 2018 and commenced your relationship with your co-offender, Mr Baker.

71[73] Your last employment was at a café in 2017 and you have done a Certificate II course in Hospitality and you have been involved with an employment agency,

19 *Boulton v The Queen* (2014) 46 VR 308 ('Boulton')

seeking a position.

Medical report.

72[74] Your counsel relied on a medical report prepared by well-known forensic psychologist, Mr Jeffrey Cummins.[20] This report was prepared after a face-to-face interview. It appears, however, that Mr Cummins was not provided with the record of interview. Unlike the report of your co-offender, Mr Cummins did not diagnose you with any mental health condition. Having obtained your personal history and occupational background, he assessed you as being slightly below average intelligence. Significantly, he found you did not have an anti-social personality disorder but presented with a moderately dependent personality style.

73[75] He noted that you had received minimal mental health counselling, although you did undertake outpatient drug counselling in Tasmania in 2017. He found that you had adult ADHD symptoms, and symptoms of mild autism spectrum disorder. These diagnoses were made without the benefit of any antecedent medical material and based on a single interview, I accept the submission of the learned Crown Prosecutor, that they should be given little weight.

74[76] Mr Cummins was of the view that you remained dependent on cannabis and he encouraged you to cease that. He found that your previous dependency on methylamphetamine has now essentially resolved. He was of the view that there were no major barriers to you becoming fully rehabilitated. He was of the opinion that a CCO would be of assistance to you. I have had you assessed for a CCO and you were found to be suitable. The report indicates that you have a long-term addiction to cannabis and are still currently using methylamphetamine, cannabis, and GHB. You told the examiner that you

[20] Exhibit 4 on the plea.

suffer from depression and anxiety, but you have not been medicated and self-medicated with cannabis and other drugs.

75[77] Your counsel indicated in a submission, that you have self-medicated because you are not aware of other avenues for treatment of anxiety and depression. You indicated to the examiner that you wished to engage with the local Aboriginal cooperative to help with drug addiction counselling and wished to obtain work. Significantly, she assessed you as having a high risk of re-offending. Mr Pickering, the learned Crown Prosecutor, emphasised that comment in the CCO report.

Overall sentencing submissions.

The purposes of sentencing.

76[78] The basic purposes for which a court may impose a sentence are punishment, deterrence, both specific and general, rehabilitation, denunciation, and protection of the community. In sentencing, I must have regard to a range of factors, such as seriousness of the offences, your culpability for them, your personal circumstances and those of the victim, if any. I am required to balance the interests of the community in denouncing criminal conduct with the interests of the community in seeking to ensure that as far as possible, offenders are rehabilitated and reintegrated back into society.

77[79] Before turning to other sentencing considerations regarding each of you individually, it is important to note and emphasise the seriousness of the offending here in this sentencing calculus. Your offending involved a systematic and sophisticated and determined course of conduct, involving identify theft. As I have indicated, you were able to exploit witnesses in the financial controls established by the target financial institutions. You utlilised materials from the Dark Web to break into systems and steal the identity of

customers. You then exploited that material for your personal gain.

78[80] You were frustrated in achieving that on a number of occasions, but still, a significant amount of money or goods, approximately $55,460 was appropriated by the two of you for your own purposes, namely, to feed your drug addiction or in your case, possibly Mr Baker, to feed into pokies.

79[81] As it has been noted by the courts, this type of offending calls for sentences that emphasise general deterrence and denunciation. The offending is difficult to detect, and your successful defrauding of the financial institutions undermines the confidence of members of the community in financial institutions. The cost of protecting those institutions from attacks by criminals such as each of you, is borne by all their customers. In addition, the individual customers had their digital privacy invaded by your use of their personal identifying material to achieve your frauds.

80[82] It follows from the seriousness of the offending and the impact on the financial institutions and the impact on the individual customers, albeit not financial, and the fact that this type of offending is difficult to detect, that considerations of general deterrence and denunciation are prominent in sentencing you. A signal must be sent to those tempted to seek to acquire financial tools from the Dark Web to exploit weaknesses in financial controls of financial institutions; that the price to be paid by way of penalty will outweigh any benefits and rewards.

81[83] In your case, Mr Baker, considerations of specific deterrence are also of some relevance, given your prior criminal record including that for part of the offending you were on a Community Corrections order. Mr Pickering also submitted that specific deterrence was applicable in both your cases due to your lack of insight of each of you into the offending as indicated in the Community Corrections assessment. I regard specific deterrence as more

salient in your case, Mr Baker, because of your prior offending and the comments you made in the record of interview that I have referred to. In your case, Mr Joseph, given you are a first offender, I see specific deterrence as having less salience.

82[84] In the sentencing synthesis, rehabilitation into the community for each of you is a relevant sentencing consideration. On that basis, both of your counsel submitted that a community corrections order was the appropriate disposition. I had you assessed for one, each of you. The learned Crown prosecutor, Mr Pickering, in a forceful submission, reiterated today, urged the court to impose a custodial sentence on each of you. He submitted that a combination sentence was not within range for each of you.

83[85] I have determined that each of you must serve a sentence of imprisonment. In your case, Mr Joseph, I propose sentencing you to a term of imprisonment, followed by a Community Corrections order.

84[86] In relation to you, Mr Baker, I am proposing a head sentence and a non-parole period.

85[87] In sentencing each of you, I must have regard to consideration of parsimony and totality. Parsimony is relevant to both of you in that you are both relatively mature individuals, standing for sentence before a higher court for the first time, and being sentenced to a term of imprisonment for the first time. I must have regard to the impact of a sentence of imprisonment on each of you, particularly in the current pandemic.

86[88] In the case of you, Mr Baker, I have determined that a head sentence and a non-parole period is called for having regard to the overall seriousness of your offending, your antecedents, and the seriousness of the charge of blackmail.

87[89] In assessing the length of sentence, I have taken into account that you have

an anxiety condition, which will mean that a sentence will weigh more heavily on you than a person of normal fortitude, and I have extended leniency on that basis.

88[90] In your case, Mr Joseph, I have taken into account the comments of Mr Cummins, that you have a dependent personality and I have also take into account in both your cases, that you have both had a dysfunctional family upbringing; your case, Mr Baker without a father, and your case effectively with Mr Joseph, the same position.

89[91] I have also taken into account the impact of the pandemic on imprisonment, on the servings of a term of imprisonment. This has led to the restrictions on visits, the banning of visits effectively, a requirement to undertake quarantine upon inductions into a prison, and reductions in available programs, and a general level of apprehension that you cannot protect yourself from being infected by the disease in the prison, in a way that you would be able to if you were in the community.

90[92] In sentencing you, I propose to impose an aggregate sentence on the offending, on the basis that your conduct, each of your conduct arises out of a common course of action and a common substratum of facts. In your case, Mr Baker, I must deal separately with the charge of blackmail, and the other summary charges of failing to answer bail and dealing with property, being the proceeds of crime, the credit card. In fixing a non-parole period for you, Mr Baker, I have sought to allow a significant period that should you be granted parole to allow you to address your drug problems under a supervised environment in the community.

91[93] Turning to you, Mr Joseph, you come before the court as effectively a first offender at the age of 30. As set out in the reports of Mr Cummins, you come from a disadvantaged background and you have fallen into drug addiction.

Notwithstanding the seriousness of the offending, a disposition that advances your rehabilitation is called for, while also meeting the sentencing needs of general deterrence and denunciation. On that basis, I have acceded to your counsel's submission that a combination sentence of a term of imprisonment followed by a CCO is appropriate.

92[94] In framing the sentence in this way, I have sought to do it in a way that does not give rise to unjustified sense of grievance by your co-accused, Mr Baker. He does, however, face the additional serious charge of blackmail, and as I have noted, he has more significant antecedents and as I have indicated, I find him the instigator of the offending, although the execution was shared between the two of you.

Sentence

93[95] I turn now to sentence each of you.

94[96] Mr Pickering, there is only one fail to answer bail charge, is not there?

95[97] MR PICKERING: Yes.

96[98] HIS HONOUR: All right. Just to clarify, Mr Petric, your client has agreed that he will undertake a Community Corrections order?

97[99] MR PETRIC: Yes, Your Honour. My client consents to that, Your Honour.

98[100] Could both accused stand please.

99[101] This is the sentence. I am imposing an aggregate sentence on you Mr Baker, on Charges 1 to 6, Charge 8, Charges 10 to 17, they are the obtain financial advantage by deception, and Charge 7 the attempt to obtain a financial advantage by deception, and Charge 18 which is the possession of identifying information, and Charge 81 which is the charge of dealing with property suspected of being proceeds of crime. On that charge, Mr Baker,

you are sentenced to a two-year term of imprisonment.

100[102] On those same charges, you, Mr Joseph, are sentenced to a term of 10 months' imprisonment, followed by a 16-month Community Corrections order, as an aggregate sentence.

101[103] I need to deal now separately with Charge 9 which is the charge against Mr Baker only, which is the charge of blackmail. On that charge, you are sentenced to 10 months' imprisonment, and I am ordering that four months of that sentence be served cumulatively on the two-year base sentence.

102[104] On the summary charge, Mr Baker of failing to answer bail, you are sentenced to seven days' imprisonment. That is concurrent with the two-year sentence.

103[105] On the other summary charge of dealing with property the proceeds of crime, that is a credit card, you are sentenced to seven days' imprisonment, which is concurrent with the two-year base sentence.

104[106] That makes for you, Mr Baker, a total effective sentence of 28 months' imprisonment, and declare that you must serve 15 months before being eligible for parole.

105[107] In relation to you, Mr Joseph, as I say, the sentence is 10 months' imprisonment, followed by a 16-month Community Corrections order, provided you consent to it and sign it.

106[108] These will be terms of that community corrections order and I will ask Mr Petric to go through it with you; that you be under supervision for the 16-month period, it commences immediately upon your release from prison. That you undertake drug and alcohol counselling and mental health counselling as directed by the office of Corrections, and you obey all lawful directions of the office of Corrections, and the usual order that you be of good behaviour for

the period of 16 months commencing when you are released from prison.

107[109] I declare that had you, Mr Baker, not pleaded guilty, I would have imposed a total effective sentence of three years and six months' imprisonment, and a non-parole period of two years and four months' imprisonment.[21]

108[110] Had you not pleaded guilty, Mr Joseph, I would have imposed a term of three years' imprisonment, with a non-parole period of two years.[22]

109[111] You can remain seated. We are having the Community Corrections order sent up to Mr Joseph. I will stand down for a short time, so that can be explained to him by his counsel over the link. He can sign it

110[112] Well, I will stand down for a short time, and I would ask Mr Petric to explain the Community Corrections order to Mr Joseph. The Registrar has got a copy of it, he will sign it. I will send you up to all counsel, just the schedule to the sentence. Just the individual sentence, and just check whether everything is in order.

111[113] MR PICKERING: As Your Honour pleases.

112[114] HIS HONOUR: All right.

(At a later stage.)

113[115] HIS HONOUR: All right. I have signed the order; it will be sent back up to Ballarat. So, you have got to report within two days of leaving prison, Mr Joseph, and then comply with all directions and undertake any drug treatment, mental health treatment programs that they direct. If you commit an offence in that 16 months, then that is an offence itself, carries a three month gaol term and then you can come back and be re-sentenced for the original offending.

21 Pursuant to *Sentencing Act 1991,* s. 6AAA
22 Ibid

114[116] That will give you the opportunity to address any mental health problems you have got and be under supervision. Now, are there any other matters, Mr Pickering?

115[117] MR PICKERING: Your Honour, if I can just confirm it is only the forfeiture order that applies to Mr Baker. Apparently, that covers all of the property.

116[118] HIS HONOUR: All right, yes.

117[119] I want to thank both counsel for the prisoners and thank you, Mr Pickering, for your assistance in this matter.

118[120] COUNSEL: As Your Honour pleases.